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No. 80-2043

IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, *et al.*,
Petitioners,

against

STEVEN A. PICO, by his next friend FRANCES PICO, *et al.*,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of New York State United Teachers, *Amicus Curiae*

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List of Parties.

A. PETITIONERS

Board of Education, Island Trees Union Free School District No. 26;
Richard Ahrens;
Frank Martin;
Christina Fasulo;
Patrick Hughes;
Richard Melchers;
Richard Michaels;
Louis Nessim

B. RESPONDENTS

Steven A. Pico, by his next friend, Frances Pico;
Jacqueline Gold, by her next friend, Rona Gold;
Russell Rieger, by his next friend, Samuel Rieger;
Glenn Yarris, by his next friend, Richard Yarris;
Paul Sochinski, by his next friend, Henry Sochinski

Table of Contents.

Page

List of Parties i

Statement of Interest 1

Summary of Argument 2

ARGUMENT. In the circumstances presented the school board's actions in banning library books and prohibiting their use in the curriculum violated the First Amendment rights of the district's teachers and librarians to free speech and academic freedom 4

Conclusion 27

TABLE OF AUTHORITIES.

CASES:

Epperson v. Arkansas, 393 U.S. 97 (1968) 7, 14

Healy v. James, 408 U.S. 169 (1972) 2, 4

James v. Board of Education, 461 F.2d 566, 572 (2nd Cir. *cert. denied,* 409 U.S. 1042 (1972).. 10

Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).. 4, 6, 22

Keyishian v. Board of Regents, 385 U.S. 589 (1967) . 7, 14

Kleindienst v. Mandel, 408 U.S. 753 (1972) 19

Page

Mailloux v. Kiley, 323 F.Supp. 1387 (D.Mass. 1971), *aff'd* 448 F.2d 1242 (1st Cir. 1971) 5, 8

Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976)..... 3, 8, 14, 15, 17

Parducci v. Rutland, 316 F.Supp. 352 (M.D. Ala. 1970)..... 6, 7

Pickering v. Board of Education, 391 U.S. 563 (1968)..... 6, 7

Pico v. Board of Education, Island Trees Union Free School District, 474 F.Supp. 387 (E.D.N.Y. 1979), 638 F.2d 404 (2nd Cir. 1980)..... 8, 11, 12, 15

President's Council, District 25 v. Community School Board No. 25, 457 F.2d 289 (2nd Cir. 1972), *cert. denied,* 409 U.S. 998 (1972) . 3, 15, 16, 17, 24

Procunier v. Martinez, 416 U.S. 396 (1972)..... 19

Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969) 20

Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea, 454 F. Supp. 703 (D. Mass. 1978) 8, 14, 19, 20, 21

Salvail v. Nashua Board of Education, 469 F.Supp. 1269 (D.N.H. 1979)..... 8, 14, 21, 22

Page

Schneider v. State, 308 U.S. 147 (1939) 16

Shelton v. Tucker, 364 U.S. 479 (1960)..... 27

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)..... 16

Spence v. Washington, 418 U.S. 405 (1974)..... 16

Tinker v. Des Moines Community School District, 393 U.S. 503 (1969)..... 4, 6, 20

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)..... 19, 21, 22, 24

Wieman v. Updegraff, 344 U.S. 183 (1952)... 2, 7, 11, 13

OTHER AUTHORITIES:

Note, First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books, 52 St. John's L.R. 457 (1978) 22

U.S. Constitution Amendment I 4

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of New York State United Teachers, *Amicus Curiae.*

Statement of Interest.

New York State United Teachers (NYSUT) is a federation of more than 450 local teacher unions and associations with a total membership of over 188,000 educators, librarians, and other professional and school-related personnel. The New York State affiliate of the American Federation of Teachers, AFL-CIO, NYSUT is presently

the largest single state-wide teacher labor organization in the country. Included among local teacher unions affiliated with NYSUT is the United Teachers of Island Trees, the collective bargaining representative of the teachers and librarians employed by the petitioner Board of Education of the Island Trees Union Free School District.

NYSUT believes it incumbent upon itself to place before this Court the views of its membership because at issue in this case is nothing less than the role of education in a free society. If the purpose of public education—and the task of teachers—is, as Mr. Justice Frankfurter said, "to foster those habits of open-mindedness and critical inquiry which alone makes for responsible citizens," *Wieman v. Updegraff,* 344 U.S. 183, 196 (1952), the conditions in our nation's schools must be such as will support and nourish that goal. The actions of the petitioner public officials in removing nine books from secondary school libraries and from use in the curriculum and prohibiting their assignment as required, optional or even suggested reading, destroyed the atmosphere of open inquiry in the Island Trees public schools. NYSUT appears as *amicus curiae* herein to urge that the first amendment forbids public officials from closing the "marketplace of ideas," *Healy v. James,* 408 U.S. 169, 180 (1972), and rendering the academic freedom of its professional teacher and librarian members subservient to political caprice and questionable assessments of community standards.

Summary of Argument.

In 1975, after attending a conservative political conference, petitioners undertook a course of action which led to the removal of nine books from the district's libraries and prohibition of their use in the curriculum. At no point

in the process did the petitioners seek meaningful input regarding the educational soundness of their proposed course of action from their teachers and librarians. Indeed, the evidence overwhelmingly suggests that educational considerations played no part in their decision.

The petitioners' interdict sweeps broadly: teachers in Island Trees are forbidden to assign the nine books as required, optional or even suggested reading. In addition, in the absence of a coherent and specific rationale for the petitioners' decision, teachers and librarians are without guidance as to how to proceed in the future. NYSUT's view is that the petitioners' actions, in the circumstances presented, violated the Island Trees teachers' and librarians' first amendment rights of free speech and academic freedom.

President's Council District 25 v. Community School Board No. 25, 457 F.2d 289 (2nd Cir. 1972), *cert. denied,* 409 U.S. 998 (1972), which did not deal with the blanket restrictions involved herein or the issue of political motivation, does not control the facts of this case. In any event, *President's Council* does not stand for the proposition that local officials have an absolute right to remove any books from the library without concern for the first amendment. The facts in *Minarcini v. Strongsville City School District,* 541 F.2d 566 (6th Cir. 1976), more closely parallel those present herein. Moreover, the decision of the court in *Minarcini* reflects a careful balancing of the respective interests of government officials on one hand, and education professionals and students on the other, in this sensitive area.

NYSUT requests that the Court provide guidance as to procedures for book selection and removal which properly reflect the constitutional interests of all parties to the

education process. NYSUT requests that an appropriate review process should involve teachers and librarians and that the decision as to selection or removal of reading material should be based on the value of the material as an instrument of educational development. Further, intrusion of the individual moral, religious or political views of the reviewers and anyone else involved in the decision making process should be proscribed. A review process properly established and documented should minimize, if not eliminate the necessity for judicial involvement.

ARGUMENT.

In the circumstances presented, the school board's actions in banning library books and prohibiting their use in the curriculum violated the First Amendment rights of the District's teachers and librarians to free speech and academic freedom.

(A)

In *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), this Court reiterated the long standing federal constitutional principle that first amendment rights are available to teachers and students. Teachers do not shed their constitutional rights to freedom of speech or expression when they enter the classroom. Moreover, academic freedom, the preservation of the classroom as a "marketplace of ideas," is one of the safeguarded rights of the first amendment. *Healy v. James, supra,* at 180-81 (1972).

Federal appellate courts have also had occasion to rule upon the application of the first amendment in the public school setting. In *Keefe v. Geanakos*, 418 F.2d 359, 361

(1969), the United States Court of Appeals for the First Circuit was presented with the question as to whether a teacher could be disciplined for assigning to his senior high school English class and discussing in the classroom an article from Atlantic Monthly magazine containing a "highly offensive" word. After a thoughtful discussion of the context in which the word was used in the article and the teacher's treatment of the word in classroom discussion, the court upheld the teacher's qualified right to use a particular teaching method. Chief Judge Aldrich, writing for the court opined:

> If * * * the students [high school seniors] must be protected from such exposure, we would fear for their future. We do not question the good faith of defendants in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education.

Id. at 361-362.

Two years later in *Mailloux v. Kiley,* 323 F.Supp. 1387, 1390, *aff'd* (1971) 448 F.2d 1242 (1st Cir. 1971),[1] the same

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[1]Petitioners' brief quotes *Mailloux v. Kiley, supra* at 192, selectively and out of context for the proposition that teacher control of curriculum is at variance with the major function of public education [Petitioners' Brief at 20]. The court in *Mailloux* balanced the respective rights and interests of teachers and elected officials. With respect to the role of academic freedom in secondary education, the Court stated:

> In support of a qualified right of a teacher, even at the secondary level, to use a teaching method which is relevant and in the opinion of experts of significant standing has a serious educational purpose is the central rationale of academic freedom. The Constitution recognizes that

(Continued on following page)

court affirmed a decision by the United States District Court for the District of Massachusetts holding that:

> [a] public school teacher has not only a civic right to freedom of speech both outside (*Pickering v. Board of Education*, 391 U.S. 563 (1968) and inside (See, *Tinker v. Des Moines Independent Community School District, supra* at 506) the schoolhouse, but also some measure of academic freedom as to his in-classroom teaching. *Keefe v. Geanakos, supra; Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

(Footnote continued)

> freedom in order to foster open minds, creative imaginations, and adventurous spirits. Our national belief is that the heterodox as well as the orthodox are a source of individual and of social growth. We do not confine academic freedom to conventional teachers or to those who can get a majority vote from their colleagues. Our faith is that the teacher's freedom to choose among options in which there is any substantial support will increase his intellectual vitality and his moral strength. The teacher whose responsibility has been nourished by independence, enterprise, and free choice becomes for his students a better model of the democratic citizen. His examples of applying and adapting the values of the old order to the demands and opportunities of a constantly changing world are among the most important lessons he gives to youth.
>
> Choice of teaching methods rather than supplementary reading material selection was at issue in *Mailloux*. The conclusion of the court was that unless the state can prove that a teacher was put on notice not to use a particular method, the teacher is protected in using any method that is relevant to his subject and students, is regarded by experts as serving a serious educational purpose and is used in good faith. Moreover, the court held that the protection accorded to teachers in choosing a teaching method derives not from the teacher's status as a public employee, but because "in his teaching capacity he is engaged in the exercise of what may plausibly be considered vital first amendment rights." [Cite omitted] *Id.*

Although the federal judiciary will attempt to avoid involving itself in the daily operations of local schools,[2] it has never hesitated to intervene where local school officials have, by arbitrary or improper actions, transgressed the constitutional rights of teachers and students. This has been no more evident than in the area of first amendment guarantees. The safeguards of the first amendment will quickly be brought into play to protect the right of academic freedom because any unwarranted invasion of this right will tend to have a chilling effect on the exercise of the right by other teachers as well. *Cf. Wieman v. Updegraff, supra* at 194-95 (1952) (Frankfurter, J., concurring); *Pickering v. Board of Education, supra; Parducci v. Rutland, supra.*

At issue in the instant case is the petitioner school board's removal of nine books from the district's school libraries and prohibition of their use in the curriculum. While the petitioner is delegated responsibility under New York State *Education Law* for selecting textbooks[3] to be used in the schools, it may not exercise its authority in a manner that is arbitrary, capricious, improper or violative of the constitutional rights of teachers or students. *Epperson v. Arkansas,* 393 U.S. 97, 107 (1968); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). It is submitted that the actions of the school board members at issue herein, taken without any effort to obtain meaningful professional input with respect to educational soundness, were manifestly arbitrary and improper. Moreover, analysis of

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[2]It should be noted that federal involvement in the instant case was invited by petitioner. Respondents' verified complaint, which raised state as well as federal constitutional claims, was filed in New York State Supreme Court. Petitioner removed the action to federal court.

[3]No issue is presented herein with respect to the school board's authority to select textbooks. All of the books involved herein were library books or supplemental reading materials.

the content of the regulation together with the circumstances in which it was enacted compels a finding that the regulation was adopted in blatant disregard of the Island Trees public school teachers' and librarians' first amendment rights of free speech and academic freedom. *Minarcini v. Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976); *Salvail v. Nashua Board of Education,* 469 F.Supp. 1269 (D.N.H. 1979); *Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea,* 454 F.Supp. 703 (D. Mass. 1978).

The process by which nine books were removed from the libraries and classrooms of the Island Trees schools was appropriately described by Judge Sifton as "erratic and free-wheeling." *Pico v. Board of Education, Island Trees Union Free School District,* 638 F.2d 404, 416 (2nd Cir. 1980). The factors supporing Judge Sifton's conclusion included the initiation of the book removal process by board members; the source and limited extent of the board's information concerning the books removed; the delay of nearly two months between receipt of the objectionable book list and commencement of the removal process; the board's disregard of the advice and counsel of its superintendent and failure to follow established procedures; the appointment of a committee and subsequent failure to follow its recommendations; the politicizing of the book removal issue in the school board election campaign and the conduct of a public opinion poll concerning the popularity of the board's actions.[4]

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[4]The school board's course of conduct herein contrasts sharply with the policies and procedures recommended by the Regents of the University of the State of New York in later published *Selection Guidelines.* Moreover, NYSUT points out that although the *Selection Guidelines* were not available in November, 1975 when the book removal issue first surfaced in Island Trees, several alternative sources of guidance were available including guidelines issued by the American Association for School Librarians, American Association of School Administrators and National Council of Teachers of English. These sources are in fact referred to in the *Selection Guidelines.* Accordingly, had the board made appropriate and timely use of its professional personnel a responsibility method of proceeding in this sensitive area could have been devised and this entire controversy avoided.

NYSUT would augment the foregoing list with two additional procedural irregularities: the school board's failure to consult with professional personnel concerning the removal decision and abandonment of a commitment to academic freedom set forth in the collective bargaining agreement.[5] Numerous questions could and should have been addressed to teachers and librarians at every stage of the removal investigation. Moreover, is it reasonable to consider the content of a book used in the curriculum separate and apart from an experienced teacher's treatment of the material in classroom discussion? *See, Keefe v. Geanakos, supra; Mailloux v. Kiley, supra.* Who, in fact, was in a better position than the teachers and librarians in the Island Trees school system to make meaningful input with respect to the educational merit of reading materials and their suitability for the Island Trees student population?[6] *See, Keefe v. Geanakos, supra.*

[5]Article XIX of the collective bargaining agreement between the Island Trees Board of Education and the United Teachers of Island Trees, provides:

> The District's educational program is keyed to the preparation of students for intelligent and meaningful participation in a democratic society. The Board and the U.T.I.T. agree that academic freedom is essential to fulfillment of this purpose.
>
> Accordingly, it is agreed that teachers shall have the right to introduce and explore controversial material, provided only that the material and the manner in which it is presented are in good taste, appropriate to the grade level, and relevant to course content. Every effort will be made to present all sides of controversial issues.
>
> Is is understood that any topic not included in the curriculum approved by the Board of Education will not be taught. Knowledge of Board approved course content is the responsibility of each staff member.

[6]It is indeed ironic that the same school board members who removed books from their local school shelves based on an anonymous list of objectionable books supplied at a political conference now suggest that the professional personnel who they have employed—many of whom have held their jobs for over a decade—are not capable of judging the suitability of materials for their children because of their non-residence in the district's borders [Petitioners' Brief at 19].

NYSUT suggests that the Island Trees school board would have sought the advice of professional personnel had educational considerations been the touchstone of the board's inquiry. Unfortunately, the facts indicate otherwise: the board members chose to rest their removal decision on their own moral, political and religious beliefs and precious little else.[7]

With this background, consideration of the scope and rationale for the removal of the nine books is appropriate. It is significant that the nine books were removed not only from the junior and senior high school libraries,[8] but from use in the curriculum as well. Moreover, although the President of the school board states in his affidavit that neither he nor any member of his administration directed the staff not to discuss the banned volumes or the ideas contained or expressed therein, the district court determined that "for use in the curriculum" had been explained by the same official as a proscription against assignment of the books for required, optional or even suggested reading.

Numerous reasons for the removal of the nine books are suggested in the affidavits of board members and in the resolutions and press releases which accompanied the board's actions. The terminology employed is, in large

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[7]Petitioners profess to speak the voice of their community, yet at least 41% of the district residents who responded to petitioners' questionnaire expressed disagreement with petitioners' position on the book removal issue. Even assuming the reliability of petitioners' methods, NYSUT suggests that nine percent margin is not the "breathing room" contemplated by the framers of the first amendment or the federal courts. *James v. Board of Education*, 461 F.2d 566, 572 (2nd Cir.), *cert. denied*, 409 U.S. 1042 (1972).

[8]The board resolutions stated that the books were removed from elementary and high school libraries. However, only one of the eleven books, *A Reader for Writers*, was found in the junior high school and none were found in the elementary schools.

part, vague and general and the objections, with few exceptions, are not co-identified with particular books. No matter how carefully one reads the volume of materials where opinions are expressed, one is at a loss to discern any guiding principles. Certainly it is too late to suggest that what is "filthy" for one generation is necessarily so for another or that the term "anti-American" carries with it any universal truth.

Acknowledging the difficulty of proceeding in this area, can it be said that the teachers and librarians in the Island Trees public schools presently enjoy "the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma?" *Wieman v. Updegraff, supra,* at 196 (Frankfurter, J., concurring). We are certain that Judge Sifton would answer in the negative. In a strongly worded opinion, Judge Sifton stated:

> The very nature of this broad brush approach must inevitably be to suggest that the school officials' concern is less to cleanse the libraries of all books containing material insulting to members of one or another religious group or which evidences an inaccurate view of the nation's history, than it is to express an official policy with regard to God and country of uncertain and indefinite content which is to be ignored by pupils, libraries and teachers at their peril.

Pico v. Board of Education, Island Trees Union Free School District, supra at 416. We agree. But as an association of professional educators, we are particularly disturbed by the impact of the board's actions on the academic freedom of Island Trees teachers and librarians.

NYSUT believes that the content of a book and its manner of expression cannot be subjected to entirely separate analyses. As Judge Newman observed, "ideas and the language used to express them are always related." *Id.* at 438. Thus the significance of the removal of nine books is far greater than the cumulative number of pages would suggest.

Among other things, we perceive that the ideas raised in the nine books will be discussed in the classroom with great reluctance, if at all. Island Trees teachers will think twice when writing their lesson plans: not only will they reconsider their choice of materials but the topics covered and treatment of various subjects as well. With relevance succumbing to fear, curriculum changes simply will not be proposed. Librarians will try to second guess the moral, political and religious persuasions of board members before making recommendations.[9] Moreover, neither teachers nor librarians will quickly forget the personal at-

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[9]Judge Sifton adequately assessed the precarious conditions under which the Island Trees teachers and librarians must now work:

> [T]he Board's erratic and free-wheeling procedures inevitably leave it a matter of guesswork for teachers, librarians and students in the District whether other efforts at self-expression on their part will be curtailed with equally little notice and equally little opportunity for defense in the name of policies having equally little to do with the local concerns of the educational community, subject to the equally uncertain outcome of public debate.

Pico v. Board of Education, Island Trees Union Free School District, 638 F.2d at 417.

tack launched by board members against their union president when he dared to speak out against censorship on their behalf.[10]

Mr. Justice Frankfurter, in his concurring opinion in *Wieman v. Updegraff, supra,* spoke with eloquence and conviction about the purpose of education and the role of educators in a democratic society:

> That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace of action. Public opinion is the ultimate reliance of our society only if it can be disciplined and responsible. It can be disciplined and responsible only if habits of open-minded and critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.
>
> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of openmindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an

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[10]In the *Newsletter* issued to rebut newspaper stories alleged to contain "lies and misinformation * * * spread by the teachers' union, the board stated:

> Mr. Compare [union president] is fighting to keep books in our schools which are offensive to Christians, Jews, Blacks and all Americans in general. One such book [apparently referring to Vonnegut's *Slaughterhouse Five*] refers to Jesus Christ as a "man with no connections." One must ask oneself what motivates this man? * * * Why does Mr. Compare insist that these books remain in the hands of our children?

> enlightened and effective public opinion. * * * They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.

Our objection, then, is not with the conservation of the board members' point of view, but rather with the foreclosure of the opportunity for teachers and students alike to consider, to question and to discuss different perspectives.

The Island Trees Board of Education is an instrument of the State. As this court declared in *Epperson v. Arkansas, supra,* invalidating an Arkansas statute which prohibited the teaching of evolution in public schools, "It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." In the case at bar, the petitioner school board removed nine books—books which had already been part of the schools' libraries—as supplemental reading material or as part of the course material to be taught. It did so solely on the basis of the moral, religious and political views of individual board members and without any regard for the judgment of experienced educators or the educational merit of the materials in question. NYSUT submits that the board's actions are wholly improper under federal constitutional standards, *Epperson v. Arkansas, supra; Keyishian v. Board of Regents, supra; Minarcini v. Strongsville City School District, supra; Salvail v. Nashua Board of Eduction, supra; Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea, supra.*

(B)

Two circuit court decisions, *President's Council, District 25 v. Community School Board No. 25*, 457 F.2d 289 (2nd Cir. 1972), *cert. denied*, 409 U.S. 998 (1972), and *Minarcini v. Strongsville City School District, supra*, require careful analysis in this case. The district court held that the Second Circuit's decision in *President's Council* controlled the facts of the instant case. *Pico v. Board of Education, Island Trees Union Free School District*, 474 F.Supp. 387, 394 (E.D.N.Y. 1979). Dissenting from his colleagues, Judge Mansfield agreed. 638 F.2d at 419. We believe that *President's Council* is not applicable to the facts presented herein. Moreover, in our view, Minarcini, which directly addresses the issue of political motivation involved in this case, is both relevant and persuasive.

In *President's Council*, a coalition of parents, teachers, administrators, librarians and students challenged the local school board's decision to remove from the junior high school libraries in the school district all copies of *Down These Mean Streets* by Piri Thomas, one of the books at issue in the case at bar. It should be noted, however, that the school board in that case modified its action prior to the commencement of the federal suit by permitting the book to be retained in those school libraries which had previously carried the book and by making the book available on a direct loan basis to any parent who requested it for his child. In addition, teachers were not prohibited from assigning the book or using it in the cirriculum. In affirming the district court's dismissal of the complaint, the Second Circuit held that the removal of the book in that situation did not infringe upon any constitutional rights.

Although we believe that the court erred in its ultimate determination, it must be pointed out that there are significant differences between the facts in *President's Council* and the case at bar which take the case at bar out of the reach of the holding in *President's Council.* First, the subject book in *President's Council* was still available from the school libraries on a direct loan basis to the parents for their children.[11] Second, the school board's action in *President's Council* was limited to junior high school students. Last, and perhaps most importantly, the teachers in *President's Council* were not precluded from discussing, assigning or merely suggesting the book as is the case in Island Trees. A teacher or librarian in *President's Council* could not face possible disciplinary or punitive action for employing the book in his curriculum as he could in this case.

These factors were recognized as critical to the court's decision in *President's Council:*

> A book has been removed but the libarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from assigning it for outside reading. In those libraries which have the book the parent can borrow it and, if he sees fit, can loan it to his child if he wishes to read it. *The intrusion of*

[11]The school board president's observation herein that the books at issue are available at the public libraries is of no comfort to the respondent or to the teachers and librarians in Island Trees. Restraint on expression may not be justified by the fact that there may be other times, places or circumstances available for such expression. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 556 (1975); *Spence v. Washington,* 418 U.S. 405, 411, n.4 (1974); *Schneider v. State,* 308 U.S. 147, 163 (1939); *Minarcini, supra,* at 582; *Salvail, supra,* at 1275.

> *the Board here upon any first amendment constitutional right of any category of plaintiffs is not only not "sharp" or "direct" but is miniscule.* (Emphasis supplied.)

457 F.2d at 292.

The district court itself recognized the differences between the intrusion found in *President's Council* and this case in its memorandum decision of August 15, 1977, on the plaintiffs' motion to remand:

> Moreover, the "miniscule" first intrusion found in *President's Council* may well be substantially exceeded in this case because of the curriculum restrictions alleged here as well as the "political" standards allegedly applied in the evaluation of books. [cite omitted] Unlike *President's Council,* here a teacher in the Island Trees district may be precluded by the Board's action from discussing or assigning as outside reading any of the eleven subject books.

Slip opinion pages 3-4. Thus, we have absent from the *President's Council* case any realistic claim of academic freedom and free speech violations resulting from the board's actions therein. The constitutional transgressions in this case are of a much greater magnitude.

In *Minarcini,* the District Court for the Northern District of Ohio was faced with a class action challenge, on first and fourteenth amendment grounds, to the Strongsville Board of Education's selection of textbooks, refusal to accept the textbook and curriculum recommendations of the faculty, removal of two books (Kurt Vonnegut's *Cat's Cradle* and Joseph Heller's *Catch 22*) from

the school library, and order prohibiting teachers and students from discussing such books in class or using them as supplemental reading material. For purposes of our discussion, only the last two issues are germane. The district court found that the Board had not violated any first or fourteenth amendment rights on any of the issues and dismissed the complaint. The court of appeals affirmed on the textbook selection and curriculum issues but reversed on the library, class discussion and supplemental reading issues. The court held that it was unconstitutional for the school board to remove books from the library and prohibit their use and discussion in class or as supplemental reading materials because individual board members found them distasteful or morally repugnant.

In declaring the applicable school board resolutions null and void the Sixth Circuit held:

> Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members.

541 F.2d at 582. The court found that the board's action in removing the books in question from the school libraries and prohibiting their use in the curriculum was violative of the students' right of free speech as well as their first amendment right to know.[12] Reasoning that the invalidation of the school board's resolutions on the basis of the students' first amendment claims would provide an adequate remedy for the teachers, the *Minarcini* court did not

come to grips with the teachers' and librarians' academic freedom claim. The court did recognize, however, that the school board's resolutions would have a chilling effect on classroom discussion. *Id.* at 584.

(C)

Recent decisions in the District of Massachusetts and the District of New Hampshire on the issue at bar have followed the reasoning of the Sixth Circuit in *Minarcini.* Although rejected by the district court which felt bound by the Second Circuit's decision on *President's Council* and disregarded by Judge Mansfield in his dissent, we feel that discussion of these cases is timely and appropriate.

In *Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea, supra,* the issue presented was whether the defendant's decision to bar an anthology of adolescent writings from the high school library would be allowed to stand. The plaintiff's position, which was virtually identical to that of the students herein, was that the School Committee's action violated the first amendment rights of students, faculty and library staff. The School Committee defended by claiming that it had unconstrained authority to remove books from the shelves of the school library based on various state statutes under which it was delegated general responsibility for the public schools in its jurisdiction. It also contended like the school board in *Minarcini,* that since it was not required to purchase the subject anthology for the library, it could remove it at will. In an opinion by Tauro, J., the court held that while "local authorities are, and must continue to be, the principal policy makers in the public schools,"

[11]For the more recently recognized first amendment right to know see *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); and *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1972).

the School Committee's actions in removing the book did not serve a substantial governmental interest and constituted an infringement on first amendment rights of students and faculty. *Right to Read Defense Committee of Chelsea v. Committee of the City of Chelsea, supra,* at 710-11.

The court dealt the School Committee's claim of an absolute right to remove the anthology from the shelves of the school library a summary blow:

> It has no such right, and compelling policy considerations argue against any public authority having such an unreviewable power of censorship. There is more at issue here than the poem *City*. If this work may be removed by a committee hostile to its language and theme, then the precedent is set for removal of any other work. The prospect of successive school committees "sanitizing" the school library of views divergent from their own is alarming, whether they do it by book or one page at a time.

Id. at 714. Preservation of an unlimited marketplace of ideas rather than censorship should be the goal of local authorities. *See Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367 (1969) and *Tinker v. Des Moines School District, supra.* The Court concluded with a stirring reminder which is unquestionably appropriate to the facts at bar:

> The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control.

Right to Read Defense Committee of Chelsea v. School Committee of Chelsea, supra, at 715.

The factual context and holding in *Salvail v. Nashua Board of Education, supra,* is similar. In *Salvail,* the plaintiffs raised a constitutional challenge to the school board's decision to remove *Ms.* magazine from the school library. Objections to the magazine, which were raised by a board member who held strong religious and patriotic views, focused on advertisements in the magazine of political and sexual nature. Echoing *Minarcini,* and *Right to Read,* the court held that the defendants had failed to demonstrate a substantial and legitimate governmental interest sufficient to warrant the removal of *Ms.* magazine from the Nashua High School library. *Salvail v. Nashua Board of Education, supra,* at 1275.

Like *Minarcini* and *Right to Read,* the court found that the school board, while not constitutionally obligated to establish a library or place any materials on its shelves, once having done so, could not limit the privilege based solely on the political or social tastes of its membership. The school board in *Salvail,* like the school board herein, contended that the students remained free to purchase or borrow the magazine from other sources. But this justification was dismissed by the Court on the authority of *Minarcini* and cases cited therein.

Finally, the *Salvail* court considered the impact of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* where this Court struck down a statute proscribing licensed pharmacists from advertising the price of prescription drugs. The significance of *Virginia State Board of Pharmacy* in *Salvail* and in the instant case, lies in the Court's firm recognition of the fundamental two-way character of protected communication:

> Freedom of speech presupposes a willing speaker. But where a speaker exists, * * * the protection afforded is to the communication, to its source and its recipients both. This is clear from decided cases.

Salvail v. Nashua Board of Education, supra, at 1274, citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* at 756. Citing favorably a passage from a law review note, the court in *Salvail* implicitly found that "the library of a public high school is a 'forum for silent speech' with communication evidenced by the presence of a source (books) and a recipient (student-reader)." Note, First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books, 52 St. John's L.R. 457, 471 (1978).

Certain other important comparisons must be drawn between *Right to Read* and *Salvail* and the case at bar. The plaintiffs in both cases include teachers. *Right to Read* in particular focuses on the pressures that are placed on teachers and librarians when they defend the often unpopular position that the "sensibilities [of parents or local officials] are not the full measure of what is proper education." *Keefe v. Geanakos, supra,* at 361-62.

In *Right to Read* a board member requested the superintendent to determine if the librarian had knowingly put "trash" in the library so that the board could make a determination as to whether the librarian was "the type of person we want to continue in that position." 454 F. Supp. at 708. At a subsequent meeting the same board member moved that consideration be given to transferring the librarian to a classroom position because of her "mistake" in selecting the book. After the librarian spoke

out and joined with students, parents and teachers in instituting the litigation the board member was quoted in a local newspaper as stating "Who needs employees like that? Who needs employees that will fight to keep the kind of tasteless, filthy trash that is contained in the poem we voted to remove?" A day later, again in the local newspaper, the same board member suggested that the board may seek to reassign the librarian or to obtain resignations from the teachers who had taken legal action. *Id.* at 709. The obvious intent and consequence of such actions by elected local officials is to chill all but the most stalwart in the exercise of their first amendment rights. Indeed, the facts of this case show that the local union president was vilified by the petitioners in a community newspaper when he took personal responsibility for urging the position of his membership against censorship.

Secondly, the restrictions in the instant case which prohibit use in the curriculum as well as use in the library, sweep more broadly than the restrictions in *Right to Read* or *Salvail*, which relate only to the library. In his deposition, the president of the board took the position that the nine books which were banned should not be assigned as required, optional or even suggested reading. Although the board president conceded that the book might still be discussed in class, we are at a loss to determine how a teacher could raise the subject within the parameters of the board's ruling without risking disciplinary action for insubordination. Thus, the restriction at hand goes directly to the teacher and the classroom where the others do not.

Thirdly, both cases recognize that not every book removal raises questions of a constitutional magnitude. In *Right to Read* the court agreed with the Second Circuit's statement in *President's Council* that obsolescense, irrelevance, improper selection in the first instance (such as

failure to comply with reasonable regulations governing acquisitions), obscenity, and architectural necessity were appropriate considerations. *Right to Read Defense Committee of Chelsea v. School Committee of Chelsea, supra,* at 711. *Salvail* added "educational" considerations as an additional objective criteria. 469 F. Supp. at 1274. *See* Note, First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books, *supra.*

Lastly, both *Right to Read* and *Salvail* attempt to narrow rather than completely challenge or disregard the Second Circuit's holding in *President's Council.* Both cases agree, as does *Minarcini,* that *President's Council* does not stand for the proposition that local officials have an absolute right to remove any books from the library without concern for the first amendment. Furthermore, *Salvail* observes that *President's Council* was decided prior to *Virginia State Board of Pharmacy* and implies that this Court's decision would be altered by the protection to the right of communication itself that is articulated in that case. The *Minarcini* court, in fact, relied heavily on that case. *See* Note, First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books, *supra.* We respectfully suggest that in view of the conflict as to the scope of the Second Circuit's holding in *President's Council,* clarification as to its meaning and intent is necessary.

(D)

Finally, NYSUT offers a solution that should eliminate, to a great extent, the type of emotional issues and constitutional violations caused by the book banning actions under challenge in this action. In order to deal with the problem of library books that may become obsolete or

educationally unsound, the decision as to which, if any, books should be removed from a school library must be made by a standing committee of librarians, teachers, and school administrators. A book should only be removed after a finding by such a joint committee that the book is both educationally unsound and irrelevant. The criterion to be applied must be specific and must relate to the book's value and relevance as an instrument of educational development. Intrusion of the individual moral, religious, political or philosphical views of individual board members must be specifically proscribed. Censorship, in any form, or to any degree, must never enter into the decision making process. By following this suggested procedure local school officials would be removing the enormously dangerous threat of political and other subjective considerations that could be brought to bear on such decisions.

Moreover, the proceedings of the joint committee as reflected in its minutes of meetings, written recommendations and reports taken together with the actions of a school board with regard to the removal of a particular book or books, would provide a record of the removal process for a reviewing court. Where the recommendations of the joint committee are rejected by a school board under circumstances which indicate that moral and political considerations of individual board members are involved, the court should not hesitate to intervene. On the other hand, where the record demonstrates that educational or architectural considerations formed the basis for the removal decision, there would be no reason for a court to become involved. As a general rule, the decision of the school board, where not in conflict with the joint committee, should be presumed valid.

In the instant case, the Island Trees Board of Education appointed an eight member committee purportedly to review the books that it sought to remove and make recommendations to the board. [13] However, this Court should not be impressed by that procedure. First, the committee only had the power to recommend. The board retained the final authority to censor the books in question. Second, the board selected the members to serve on the committee and selected the books that it found to be objectionable (which books had been previously identified as "anti-Christian," "anti-Semitic," "anti-American" and "just plain filthy" by a "conservative" group).[14] Third, and perhaps most important, the board simply ignored the recommendations of its own committee and affirmed the removal of books that the committee had recommended the board to retain. The entire undertaking was a subterfuge, taken only after the board members had already decided that these books had to go. The odor of censorship permeated the entire process.

There are those who would suggest that a ruling by this Court in favor of the respondents would result in the filing of a federal lawsuit every time a book is removed from a library or a curriculum for any reason. That such is not the case is demonstrated in part by the paucity of cases on point. The "constant intrusion of the judiciary into internal affairs of the schools" predicted by the Second Circuit in *President's Council* simply has not materialized even in

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[13] Existing procedure called for the appointment of the entire committee by the Superintendent of Schools. Under the pretext that the procedure only applied in situations where the complaint was parent-initiated, the petitioners ignored the procedure.

[14] The Superintendent made a recommendation to the board that Mrs. Turin, District Chairman of Libraries, Mr. Brunnemer, High School Librarian, an English Department Head, and either Mr. Valenze or Mr. Carroll serve on the committee. Of the four recommended, only Mr. Carroll, a High School Principal, was appointed.

the two circuits where a more liberal interpretation of the first amendment prevails. *Id.* at 291-92.

This Court has cautioned that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). We are not asserting that "federal jurists mak[e] curriculum or library choices for the community of scholars," *President's Council, supra*, at 291-92, but merely that this Court provide guidance as to an appropriate and constitutional process for removal of books. With that in place, decision making on the issue could be returned to the local level.

Conclusion.

For the foregoing reasons, NYSUT respectfully requests that the judgment of the Second Circuit Court of Appeals reversing the district court's dismissal of the complaint and remanding the matter for trial, be affirmed.

Respectfully submitted,

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